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In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether, under Section 14(b) of the National Labor Relations Act, the states may prohibit representation fee clauses in collective bargaining agreements that compel employees who are not members of a union to pay a fee equal to their pro rata share of the cost of enforcing and servicing a collective agreement when such a share may be equal in amount to the dues and assessments required of union members.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 675 F.2d 1257. The decisions and orders of the National Labor Relations Board (Pet. App. 55a-56a) and the Administrative Law Judge (Pet. App. 57a-82a) are reported at 252 N.L.R.B. 1299.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1982. A petition for rehearing en banc was denied on June 2, 1982 (Pet. App. 54a). The Chief Justice extended the time for filing a petition for a writ of certiorari to and

including October 30, 1982 (Pet. App. 83a-84a), and the petition was filed on October 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3. The relevant provisions of the state laws involved in this case are set forth at Pet. 5 n.1.

STATEMENT

1. Petitioners represented the employees at four mills operated by International Paper Company, Southern Kraft Division ("the Company") (Pet. App. 58a-59a).[1] All of the employees at the Louisiana and Florida mills and most of the employees at the Arkansas mill were members of the respective local unions serving those mills (*id.* at 60a n.3). However, when Local 681 at the Natchez, Mississippi mill sought to require the employees to pay a yearly working assessment of 2% of their wages in addition to their monthly dues, they all resigned from that local, with the exception of the shop steward, who was not required to pay dues (*id.* at 60a).

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[1]The four mills, and the local representing the unit employees at each, were as follows: Springhill, Louisiana - Local 141; Panama City, Florida - Local 229; Natchez, Mississippi - Local 681; and Camden, Arkansas - Local 706.

Petitioners no longer represent the employees at the four mills in question (Pet. App. 80a). However, the Board and the court of appeals concluded that the case was not moot, since a dispute over the same issue had arisen at the Company's Vicksburg, Mississippi mill, where the employees are still represented by another local of the same international union (*id.* at 80a n.15; see also *id.* at 17a n.3 (dissenting opinion)). See generally *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 216 n.9 (1977).

The parties' collective bargaining agreement expired in May 1977. At the outset of negotiations for a new contract, petitioners proposed a clause requiring all non-members to pay a representation fee equal to the dues paid by members. The Company objected on the ground that such a clause would violate the "right-to-work" laws of the four states (Pet. App. 60a-61a). The parties eventually reached agreement on all other contract proposals. In August, petitioners proposed that the disputed clause require all non-members to "pay a pro rata service fee * * * which shall be less than monthly union dues" (*id.* at 61a). However, two of the locals stated that their representation fees would be equal to the dues paid by their members, and the representative of Local 681 stated that its fee would be equal to the 2% assessment which the Natchez employees had sought to avoid by resigning from union membership (*id.* at 61a-62a). Petitioners then changed their proposed clause again, to state that non-members "shall be required to contribute a pro rata share of the costs and expenses incurred by the union that are directly related to enforcing and servicing the collective bargaining agreement. * * * [I]n no case will the fee exceed the dues and assessments required of union members" (*id.* at 62a-63a). The Company rejected this clause as well, on the ground that it was contrary to state "right-to-work" laws (*id.* at 63a).

By letter dated October 17, 1977, petitioners announced that they were terminating the contract because of the Company's refusal to agree to a representation fee, and that picketing at the Natchez mill would begin on October 31 (Pet. App. 64a). The parties subsequently executed a new contract, with petitioners reserving the right to demand further negotiations on the proposed representation fee if it were found lawful (*id.* at 61a).

2. The Board, upholding the decision of the Administrative Law Judge, found that the proposed representation fee provision was a union-security clause authorized by the proviso to Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)) and that, absent state "right-to-work" laws, such a clause would be a mandatory subject of bargaining (Pet. App. 66a-69a). However, the Board further found that the proposed clause would violate the "right-to-work" laws of each of the four states in question, and that Section 14(b) of the Act (29 U.S.C. 164(b)) authorized the states to prohibit such clauses (Pet. App. 69a-77a).

Thus, the Board noted that "Arkansas, Louisiana and Mississippi have in effect statutes which expressly prohibit agreements which require non-union members to pay dues, fees, assessments, or any other form of monetary consideration to any kind of labor organization as a condition of employment" and Florida's law has been judicially construed to the same effect (Pet. App. 70a). The Board also noted (*id.* at 74a-75a) that the Arkansas law involved here and similar laws in several other states had been in existence when Congress enacted Section 14(b) in 1947. The Board concluded that "[t]here is nothing to demonstrate that such a broad prohibition by States had not been contemplated by Congress when it enacted Section 14(b) of the Act" (Pet. App. 75a). Rather, it "appears that both proponents and opponents fully understood that the scope of Section 14(b) granted to the States the power to enact legislation covering the breadth of compulsory unionism" (*id.* at 74a).

Accordingly, the Board concluded that the clause at issue here was a non-mandatory subject of bargaining and that petitioners therefore violated Section 8(b)(3) of the Act (29 U.S.C. 158(b)(3)) by insisting to the point of impasse on inclusion of the clause in the collective bargaining agreement (Pet. App. 55a-56a n.1, 79a).

3. A divided court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-53a). The court concluded that "the legislative history of § 14(b) supports the position of the Board" (Pet. App. 8a). It noted that Congress was aware of the existence of state laws that had outlawed contract provisions such as that at issue here and it pointed out that "[t]he Mississippi statute at issue here is almost identical to the Georgia statute * * *, which Congress practically incorporated by reference into the legislative history of § 14(b)" (*id.* at 6a).

The court added that "Congress also knew about the free rider problem posed by such laws," but sanctioned them anyway (Pet. App. 6a-7a). Addressing the complaint of the Union and the dissenting judge[2] that "free riders pose more of a burden today than they did when § 14(b) was enacted," the court concluded (*id.* at 10a-11a; footnote omitted) that

> that argument is better addressed to Congress than to this court. A state law valid under § 14(b) in 1947 is valid today, and there is no serious question but that Congress in 1947 intended laws like Mississippi's to survive federal preemption. Moreover, on the facts of this case Mississippi's right-to-work law protects precisely those liberties Congress allowed the states to preserve. The men at the Natchez plant once belonged to the Union. They fled the Union when it raised its tax

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[2]Judge Mikva, dissenting below, viewed the legislative history as showing only an intent to permit states to ban clauses, such as closed shop or union shop agreements, requiring union membership (Pet. App. 23a-37a). In his view, the proposed representation fee would not require "membership" within the meaning of Section 14(b) (Pet. App. 38a-51a).

upon their labor. * * * This is precisely the "compulsory unionism" Congress had in mind when it passed § 14(b), and this is the core of membership the Supreme Court has interpreted § 14(b) to encompass.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court. Accordingly, review by this Court is not warranted.

1. The proviso to Section 8(a)(3) of the Act permits an employer and a union, under certain conditions, to enter into an agreement requiring membership in a union as a condition of employment. See *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 745 (1963). However, Section 14(b) of the Act states: "Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

In *Retail Clerks International Association, Local 1625* v. *Schermerhorn*, 373 U.S. 746 (1963), this Court refused to limit state power under Section 14(b) of the Act to the prohibition of agreements requiring actual union membership as a condition of employment. The Court explained (373 U.S. at 751):

> The connection between the § 8(a)(3) proviso and § 14(b) is clear. Whether they are perfectly coincident, we need not now decide, but unquestionably they overlap to some extent. At the very least, the agreements requiring "membership" in a labor union which are expressly permitted by the proviso are the same "membership" agreements expressly placed within the reach of state law by § 14(b).

Noting that, in the companion case, *NLRB* v. *General Motors Corp., supra,* it had held that the proviso to Section 8(a)(3) permits the conditioning of employment upon payment of union dues and initiation fees, and not only upon actual union membership, the Court concluded that Section 14(b) must similarly be interpreted as allowing the states to prohibit agreements requiring such payments as well as agreements requiring actual union membership. However, the Court left open "the status of less stringent union-security arrangements * * *." *Schermerhorn, supra,* 373 U.S. at 751-752.

Petitioners contend (Pet. 9) that their proposed union-security provision "is entirely distinct from the *Schermerhorn* clause." The Board reasonably concluded that the proposed provision cannot meaningfully be distinguished from that in *Schermerhorn.*

Thus, both the Board (Pet. App. 75a n.14) and the court of appeals (*id.* at 11a n.8) found that the clause could require the covered employees to pay an amount equal to the regular dues structure, which was exactly what was required in *Schermerhorn.*[3] For, while Local 681 stated that its fee would equal the 2% assessment which the Natchez employees sought to avoid by resigning, the proposed clause involved here provides only that the "representation fee" is not to "exceed the dues and *assessments* required of

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[3]The clause in *Schermerhorn,* like the one proposed here, did not by its terms require the payment of "dues and initiation fees"; rather, it required non-members to pay "an initial service fee and monthly service fees to the [u]nion for the purpose of aiding the [u]nion in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit." 373 U.S. at 748. The service fees were not to exceed the dues and initiation fees paid by members, and non-members would have no further financial obligations to the union. *Id.* at 749.

union members" (Pet. App. 63a; emphasis added). As the Board pointed out (*id.* at 75a n.14), if petitioners' representation expenses were to exceed their receipts from dues and "representation fees" — which could easily happen if, for example, they had a number of expensive arbitrations — petitioners could require non-members to pay not only the equivalent of dues, but also the equivalent of assessments, which might well exceed the amount of dues[4] and which may not be required as a condition of employment even in a non-"right-to-work" state.[5]

Moreover, the proposed provision suffers from the same infirmity noted by the Court in *Schermerhorn* (373 U.S. at 753-754) — viz., even if all of the funds collected from non-members were used solely in payment of bargaining expenses, the non-members would nevertheless end up subsidizing the union's institutional activities. Thus, in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 237 n.35 (1977), the Court, relying on *Schermerhorn*, stated that "[i]t is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to

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[4]Petitioners contend (Pet. 9) that the proposed non-member representation fee would necessarily be less than members' dues except in "the entirely unlikely event that the independent audit showed the union to have no expenses other than those attributable to enforcing and servicing the collective agreement * * *." That statement is not correct. Petitioners apparently assume that under its proposal members and non-members alike will pay a pro rata share of *actual* collective bargaining costs and members will pay an additional amount for institutional expenses. There is no evidence, however, that members' dues and fees fluctuate with actual expenses. Accordingly, should the pro rata share of the *actual* cost of servicing the contract equal or exceed the pre-set members' dues and fees, non-members might be required to pay the same amount as members.

[5]See *Peerless Tool and Engineering Co.*, 111 N.L.R.B. 853, 871 (1955), enf'd *sub nom. NLRB* v. *Die and Tool Makers Lodge No. 113*, 231 F.2d 298 (7th Cir.), cert. denied, 352 U.S. 833 (1956); *NLRB* v. *Food Fair Stores, Inc.*, 307 F.2d 3, 11-16 (3d Cir. 1962).

collective-bargaining purposes. '[Such a limitation] is of bookkeeping significance only rather than a matter of real substance.' " Indeed, even the dissenting judge below acknowledged (Pet. App. 47a n.16) that under the proposed clause

> once a union receives a pro rata share of collective bargaining costs from nonunion employees, monies in the union treasury that had formerly been used to represent those employees will be freed up to pay other, institutional expenses of the union.

2. The legislative history of the Act supports the Board's position that the proposed clause at issue here cannot meaningfully be distinguished from that in *Schermerhorn* for purposes of coverage under Section 14(b) of the Act. Thus, as both the Board (Pet. App. 74a-75a) and the court of appeals (*id.* at 6a-7a) pointed out, when Congress enacted Section 14(b), it specifically noted and did not disapprove state laws that prohibited assessments identical to those involved here.[6]

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[6]The House Report specifically mentioned 12 states as having "right-to-work" laws, four others as allowing union-security clauses only after employee votes, and 14 other states as having "right-to-work" laws under consideration. 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 325 (1948) ("*Legis. Hist. LMRA*"). Three of the 12 states mentioned as having enacted "right-to-work" laws (Arkansas, Georgia, and Tennessee) expressly prohibited compulsory payments to, as well as compulsory membership in, unions. The Arkansas statute cited in the legislative history is involved in this case and is set forth at Pet. 5 n.1. The Georgia statute (Ga. Code § 54-903 (1982)), enacted March 27, 1947, reads: "No individual shall be required as a condition of employment, or of continuation of employment, to pay any fee, assessment, or other sum of money whatsoever, to a labor organization." The Tennessee statute (now codified at Tenn. Code Ann. § 50-210 (1977)) makes it unlawful to exclude any person from employment for "payment of or failure to pay dues, fees, assessments, or other charges to any labor union or employee organization of any kind." Three more states, two of which were mentioned in the House Report as

Petitioners rely (Pet. 10-11) on the assertion of the dissenting judge below (Pet. 36a) that "the legislative history does not suggest that Congress knew these [state] laws sometimes prohibited payment of 'any dues, fees or charges of any kind to any labor union' * * *." The dissent offers no basis for this statement. Indeed, the evidence is to the contrary. Thus, the Senate Conference Report explained: "Many States have enacted laws or adopted constitutional provisions to make *all forms of compulsory unionism* in such States illegal" and, "[a]s stated in the report accompanying the Senate committee bill, it was not the intent to deprive the States of such power." 2 *Leg. Hist. LMRA* at 1543 (emphasis added). The House Conference Report contained similar language and added that the House provision, adopted in substance by the conference, was designed "to assure that nothing in the [A]ct was to be construed as authorizing any closed shop, union shop, maintenance of membership, *or other form of compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State law." 1 *Leg. Hist. LMRA* at 564 (emphasis added). Nothing in the legislative history indicates that Congress was unaware of the substance of the state "right-to-work" laws it cited or that it intended to preserve only those state laws that banned actual compulsory membership in unions while nullifying those laws that banned compulsory payments of the scope involved here. As this Court has stated, "Congress seems to have been well informed [about state right to work laws] during the 1947 debates * * *." *Retail Clerks International Association, Local 1624* v. *Schermerhorn*, 375 U.S. 96, 100 (1963).

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having "right-to-work" laws under consideration, enacted similar laws before the final passage of the Taft-Hartley Act on June 23, 1947. See N.C. Gen. Stat. § 95-82 (1981) (enacted March 18, 1947); Iowa Code § 731.4 (1979) (enacted May 1, 1947); Tex. Rev. Civ. Stat. Ann. art. 5207a (Vernon 1971) (enacted April 8, 1947).

3. Petitioners' reliance (Pet. 12-13) on cases[7] holding that a union operating an exclusive hiring hall may charge non-members a service fee for the use of the hiring hall is unavailing. A union is under no obligation to operate a hiring hall; since it could refuse to refer anyone — member or non-member — for employment, it may also require that anyone it does refer shall pay for the use of the referral service — members through their dues and non-members through a fee. Here, in contrast, petitioners sought, by their proposal for a "representation fee," to charge non-members in their bargaining units for services that an exclusive bargaining representative is required by law to provide for all unit employees. The instant case thus is analogous to *IAM, Local 697, (H.O. Canfield Rubber Co.)*, 223 N.L.R.B. 832, 834-835 (1976), in which the Board, reaffirming its earlier decision in *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953), held that a union barred by a state "right-to-work" law from requiring employees to become members could not require non-members to pay the cost of processing their grievances, since grievance representation was due them as a matter of right. The Board rejected the union's argument that it was only seeking to protect itself from "free riders," pointing out that in *Hughes Tool* it had held that state "right-to-work" laws could not be evaded by requiring non-members to pay a fee for services due them as a matter of right, and that doing so was equivalent to representing only members in the grievance procedure.

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[7] *Local 825, International Union of Operating Engineers*, 137 N.L.R.B. 1043 (1962); *Local 1351, Steamship Clerks and Checkers* v. *NLRB*, 329 F.2d 259, 262 (D.C. Cir.), cert. denied, 377 U.S. 993 (1964); *NLRB* v. *Local 138, International Union of Operating Engineers*, 385 F.2d 874, 875-876 (2d Cir. 1967), cert. denied, 391 U.S. 904 (1968).

4. Finally, petitioners contend (Pet. 7-8, 9-10) that denial of the right to charge non-members in "right-to-work" states for services that the exclusive bargaining representative is required by law to perform will impose an undue financial burden on unions and impair performance of their statutory duties by allowing "free riders". As the court of appeals correctly observed (Pet. App. 10a), however, this contention is directed to the wrong forum. The legislative history of the 1947 amendments clearly shows that Congress was aware of the problem of "free-riders." See 1 *Leg. Hist. LMRA* at 412, 741. Congress nevertheless enacted Section 14(b) of the Act and thereby permitted the states to enact laws that have the effect of perpetuating the "free rider" problem. If a change of policy is necessary because the duty of fair representation has imposed burdens on unions not contemplated by Congress in 1947, such a change is for Congress (or the state legislatures), not this Court, to make. See *Abood* v. *Detroit Board of Education, supra,* 431 U.S. at 225 n.20; *Railway Employees' Department* v. *Hanson,* 351 U.S. 225, 233-234 (1956).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISHER
Attorney

National Labor Relations Board

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